

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

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75-2087

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United States Court of Appeals
For the Second Circuit

UNITED STATES *ex rel.* **RONALD MILLER,**
Petitioner-Appellant,
against

LEON J. VINCENT, Superintendent of Green Haven
Correctional Facility,
Respondent-Appellee.

**On Appeal from the United States District Court
for the Southern District of New York**

BRIEF FOR RESPONDENT-APPELLEE

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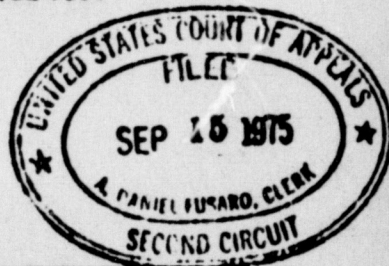


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BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Whether Ronald Miller's conviction for felony murder is based on any relevant evidence.

Preliminary Statement

Petitioner Ronald Miller appeals from an order of the United States District Court for the Southern District of New York (POLLACK, D. J.), entered December 17, 1974, which denied his petition for a writ of habeas corpus. On June 18, 1975, this Court granted a certificate of probable cause for appeal to this Court.

On the morning of October 25, 1970, appellant, Ronald Miller knocked on the apartment door of a fellow-tenant, Robert Fennell. When Fennell opened the door, Miller sprayed Fennell in the face with a can of mace, and then lunged across the portal, stabbing Fennell with a butcher knife. When Fennell's roommate, Rasul Aleem attempted to aid Fennell, Miller turned and stabbed Aleem in the chest, killing him.

On November 19, 1970, a New York County Grand Jury returned a three-count indictment against Miller. New York County Indictment No. 6260-70. Count one charged Miller with felony murder, predicated on Miller's killing of Aleem while Miller was engaged in the commission of the crime of burglary—unlawfully entering or remaining in Fennell's apartment with the intent to commit the crime of assault on Fennell. New York Penal Law §125.25(3); §140.20. The second count of the indictment charged Miller with the common law murder of Aleem. New York Penal Law §125.25(1). And the third count of the indictment charged Miller with the attempted murder of Robert Fennell. New York Penal Law §§110.00/125.25(1).

On July 23, 1971, Miller was convicted by a jury, in the Supreme Court, New York County, of felony murder, manslaughter in the second degree under the second count of the indictment, and assault in the first degree under the third count of the indictment. On November 8, 1971, pursuant to a motion by the petitioner to set aside the verdict, Hon. HAROLD BAER of the Supreme Court, New York County, set aside the felony murder verdict, ruling that there was no "credible evidence to sustain an intent to commit a burglary"; that "perhaps assault was intended";

but that assault is not one of the enumerated crimes which may serve as a predicate felony for murder under New York Penal Law §125.25(3). *People v. Miller*, 70 Misc.2d 594 (S. Ct., N.Y. Co. 1971).

As to the manslaughter and assault convictions, the court sentenced Miller to concurrent terms of five years in prison.

The New York County District Attorney appealed to the Appellate Division, First Department from the order setting aside the felony murder conviction. That court affirmed the trial court's order with one justice dissenting. *People v. Miller*, 39 A.D.2d 893 (1st Dept. 1972). The District Attorney appealed to the New York State Court of Appeals.

On April 26, 1973, the New York State Court of Appeals unanimously reversed the order of the Appellate Division and reinstated the felony murder verdict. *People v. Miller*, 32 N.Y.2d 157 (1973). In an opinion by Judge JASEN, the court held:

The People's evidence, if believed, established that the defendant went to Fennell's apartment uninvited and armed with a butcher knife and spray can; that when the apartment door was opened, he lunged across the threshold, sprayed Fennell with a choking gas, and attacked him with the knife; and that when Aleem came to Fennell's aid, the defendant fatally stabbed him. We deem this evidence to be legally sufficient for the jury to find that the defendant committed the crime of burglary by knowingly entering unlawfully Fennell's apartment with the intent to assault Fennell. *Id.* at 159.

* * * Thus, since the defendant killed Aleem in the course and in furtherance of his commission of burglary, the requirements of the felony-murder statute are satisfied.

On May 15, 1973, Miller was sentenced to a term of imprisonment of fifteen years to life on that reinstated verdict.

Miller then appealed his conviction for felony murder, manslaughter in the second degree and assault in the first degree, to the Appellate Division, First Department. On February 18, 1975, that court unanimously affirmed the conviction. *People v. Miller*, 47 A.D.2d 613 (1st Dept. 1975).

On March 1, 1975, Miller's application for leave to appeal the Court of Appeals was denied (JONES, J.).

On June 18, 1974, prior to the affirmance of his state conviction, Miller petitioned for a writ of habeas corpus in the United States District Court for the Southern District of New York. In his petition, Miller contended, *inter alia*, that his conviction for felony murder violated due process. He argued that the state failed to prove that he knowingly entered Fennell's apartment unlawfully. He maintained that he "honestly believed" that he was invited.

Judge POLLACK, in denying the petition, concluded that "Petitioner's 'honest belief' that he was an invitee to the apartment was a question for the triers of fact and does not rise to federal constitutional dimensions unless there was no proof whatever of the crime charged—a condition which is not met in this case."

On appeal to this Court, Miller again contends that the State failed to prove that he was committing a burglary when he killed Rasul Aleem and that therefore, his conviction for felony murder violated due process.

Statement of Facts

The People's Case

On Sunday morning, October 25, 1970, **Mattie Zigler** was living in apartment 5B at 171 Morningside Avenue with the appellant, Ronald Miller (Zigler: 160).^{*} They had just returned from a party where they had been drinking, and at about 9:00 a.m., while inside her bathroom, she heard a male voice apparently coming from the apartment directly below hers, the apartment which Robert Fennell shared with Rasul Aleem (Zigler: 160-5). When Miller responded to the voice and asked what the speaker had said, the speaker from downstairs stated that if Miller "wanted to do anything about it to come downstairs" (Zigler: 167-8). Miller then went downstairs (Zigler: 168).

On the morning in question, **Robert Fennell** and his roommate Rasul Aleem awoke at 8:15 and started drinking wine together (Fennell: 240-1, 249). Fennell heard no noises coming from the upstairs apartment. Nor did he converse with any neighbors through an airshaft adjoining the apartment (Fennell: 241).

At approximately 9:00 a.m., Fennell heard a knock at his apartment door. He inquired who was there and

^{*} Numerical references are to the pages of the state court trial record.

heard the reply, "It's Ronald" (Fennell: 241). Fennell opened the door and saw Ronald Miller, who was holding a spray can in his left hand and a butcher knife in his right (Fennell: 241-3). While standing outside the door, Miller suddenly extended his left arm and sprayed at Fennell's face with a "chocking gas"; as Fennell ducked down, Miller stabbed him in the right arm (Fennell: 241-3, 245, 250).*

Fennell started backing up, shouting at Miller "What's wrong with you," but Miller, following Fennell into the apartment, continued to spray and stab at him (Fennell: 242). "Continuously backing up," Fennell grabbed a metal rod lying on the floor and tried to strike Miller with it, but Miller knocked it out of his hand. Fennell tripped and fell, and as Miller was about to come down upon him with the knife, Fennell grabbed his attacker's arm and shouted to his roommate Aleem to help him (Fennell: 243). Aleem retrieved the metal rod and struck appellant on the back. Miller then turned and stabbed Aleem in the chest (Fennell: 244).

Aware of his deed, Miller dropped his knife, ran out of the apartment (Fennell: 244, 247), called to Miss Zigler and told her "to come downstairs, because he [thought] he had killed a man" (Zigler: 169). Miss Zigler did so, "examined the body" of Aleem and then went to find the police (Zigler: 169-170).

Patrolmen **Reno Marini** and **Aaron T. Grossman** responded to 171 Morningside Avenue at approximately

* The gas container was later recovered by Detective Simmons and was analyzed at the police laboratory where it was found to contain a "noxious" gas which was capable of "incapacitat[ing] one if it's sprayed in someone's face" (Simmons: 449-50; Pompa: 484-6).

9:00 a.m. after speaking with Miss Zigler in the street (Marini: 330-2; Grossman: 367-9). As they ascended the stairs to the fourth floor, they encountered a crowd in front of apartment 4B; Officer Grossman inquired of Miller as to what had happened and Miller responded "I killed that man." Patrolman Grossman then arrested Miller. Simultaneously Officer Marini entered the Fennell-Aleem apartment and discovered the body of a person lying on the floor against the front door and saw Fennell sitting on a bed bleeding "tremendously." Upon making these observations Officer Marini heard a commotion in the hallway, to which he returned. There he found Miller, who weighed approximately 285 pounds, struggling with Officer Grossman; Marini, Grossman and two additional officers subdued Miller and placed him in a patrol car to be taken to the precinct (Marini: 333-5; Grossman: 370-1, 389). Fennell was taken to Knickerbocker Hospital where Dr. **Vichien Ratana** treated him for stab wound of the upper right shoulder, upper right arm and the rear of his right elbow (Marini: 358; Ratana: 414-17).

En route to the precinct, Miller blurted out "Oh my God, it was an accident" (Grossman: 373). And once inside the precinct Miller repeated his claim that it was an "accident," accompanying his statement with an explanation that he had been "joking" ["slashing or stabbing * * * with a knife" (Grossman: 381-2) at Fennell and that he had then turned about with the knife. As Miller related this account, he "started describing and making motions with his hands," showing that he had been slashing at Fennell with "downward motions" and then "turned around * * * making a sweeping motion" (Grossman: 381-2).

Later that day, while Miller was being held in the precinct's detention cell, appellant's mother and several others came to visit him. In the presence of Detective **Archer Simmons**, who was seated at a desk in open view, Miller recounted to his mother his version of the events in Fennell's apartment:

He said to his mother, "I didn't mean to do it. I was fighting with [Fennell]. I was piercing [Fennell's] skin, and his friend came to help him." And then he went into a demonstration. He showed his mother how he was over [Fennell] making knife thrusts at him, and he says he felt someone in back of him striking him from the rear, and that he half turned, with the knife in his right hand, and he stuck Aleem, and he didn't mean it (445-6).

While Miller was at the precinct, Dr. **John F. Furey**, Chief Medical Examiner for New York County, proceeded to the Fennell-Aleem apartment where he found Aleem to be dead (Furey: 472). Two days thereafter, Dr. Furey performed an autopsy and concluded that Aleem had died from a single stab wound which had entered his body above his left nipple and pierced his heart, causing "massive hemorrhage". The wound was "at least four inches deep" and had been caused by a thin, single-edge blade (Furey: 472-4). At the time of death, Aleem had been intoxicated (Furey: 475).

The Defendant's Case

Ronald Miller testified that on the morning of the killing, he had returned from a party with Mattie Zigler, arriving home at about half-past seven carrying two chicken dinners with him (525-6). [Mattie Zigler testified that they brought

no food home from the party (203).] While Mattie Zigler was in the bathroom, Miller obtained a knife from on top of the refrigerator to cut the chicken (534). While he was holding the knife, Miss Zigler emerged from the bathroom and told Miller that "the man downstairs underneath [them] had called" (535). Miller testified that he then proceeded downstairs immediately, carrying the knife in his right hand (535).

Miller knocked on the door of apartment 4B and Fennell answered, "Who is it?" When Miller identified himself, Fennell opened the door and Miller stepped into the apartment, closing the door behind him (536). Almost immediately Fennell and Miller started to argue and Miller tried to leave the apartment, having some difficulty opening the door (542-4). Fennell grabbed Miller and as he pulled Miller by the left arm, reached into his pocket, withdrew a can of mace which he allegedly carried in his employment as a security guard, and sprayed at Fennell (543-8).

The two fell to the floor, Fennell holding Miller's left hand which contained the knife (548-51). At this point, Miller claimed, he was struck over the head with an iron pipe (548, 552). Miller then turned and when he saw the pipe about to be lowered against his head again, he threw his arm up, inadvertently stabbing Rasul Aleem to death (553-4).

The Opinion of the Trial Court Setting Aside the Felony Murder Verdict

After both sides had rested, the trial court denied a motion by the defense to dismiss the felony murder count, finding that sufficient evidence had been adduced proving the predicate felony of burglary to warrant submission of that count to the jury (634). Subsequently, after the jury had rendered its verdict convicting Miller of felony murder, the court, on November 8, 1971, granted a motion by defense counsel to set aside the felony murder verdict, ruling in relevant part:

Burglary is defined in the Penal Law as entering and remaining in a building unlawfully; knowingly so entering and remaining without privilege or license to do so, and with intent to commit a crime therein (P.L. 140). The evidence is to the contrary. Mattie Zigler testified that the defendant was asked to come down to the victim's apartment (R. at pages 163, 165, 167, 168, 169). Furthermore, one of the victims, Fennell, testified that he opened the door after the defendant knocked (R. page 241). Nowhere in the record is there credible evidence to sustain an intent to commit a burglary. The People have failed to prove the Burglary beyond a reasonable doubt. Certainly, the felony that eliminates the intent necessary for homicide must be one that is independent of the homicide and of the assault merged therein (Peo. v. Huter, 184 N.Y. 237; Peo. v. Wagner, 245 N.Y. 143; Peo. v. Moran, 246 N.Y. 100, 102).

The jury found the defendant guilty of Manslaughter in the Second Degree. They agreed unanimously that there was no intent to murder but death was caused by reckless conduct of the defendant. There is no justification for the first count of this indictment.

There is no evidence to sustain it. This Court did not dismiss the first count of the indictment at the end of the People's case because of the insistence of the People that the burglary had been proved beyond a reasonable doubt. After reviewing the record, this Court disagrees. It does not serve the ends of justice to stretch the legislative intent in regard to Felony Murder. Judge Cardozo said in *People v. Moran*, supra, "Evidence uncertain in its implications must not be warped or strain to force a jury into the dilemma of choosing between death and freedom" (at page 105). This defendant never intended to burglarize. Perhaps assault was intended, but assault is not one of the included crimes from which Felony Murder may evolve (P.L. 125.25[3]). In the interest of justice, the first count of the indictment is dismissed. That part of the motion to set aside the verdict as to the first count of the indictment and to dismiss that count is granted.

People v. Miller, 70 Misc. 2d 594 (S. Ct., N. Y. Co. 1971).

The Decision of the Appellate Division, First Department, Affirming Justice Baer's Order Setting Aside the Felony Murder Verdict

On June 27, 1972, the Appellate Division affirmed the order of Mr. Justice BAER. The majority, by a memorandum decision, noted in relevant part:

We agree with the learned Trial Justice that a conviction of felony murder, under the particular facts and circumstances of this case, should not be permitted to stand. Assault is not one of the specified felonies forming a basis for felony murder * * *; and the evidence adduced on the trial should "not be warped or strained" to find another independent felony in order to sustain this conviction * * * the purpose of enumerating the underlying felonies upon which felony

murder may be based "is to exclude * * * cases of accidental or not reasonably foreseeable fatality occurring in an unlikely manner in the course of a non-violent felony."

In a dissenting memorandum, Mr. Justice McNALLY wrote in relevant part:

The evidence of the People, credited by the jury, establishes defendant's entry in the apartment was unlawful within the meaning of the Penal Law. The trial court predicated the dismissal of the alleged failure to establish a burglary. The trial court may not set aside a verdict, except as a matter of law, and therefore, may not decide an issue of fact inconsistent with the verdict * * * Defendant contends that the assault merged in the homicide. However, this is not so as to the burglary. * * *

People v. Miller, 39 A. D. 2d 893 (1st Dept. 1972).

The Opinion of the New York Court of Appeals Reinstating the Felony Murder Verdict

By a unanimous decision on April 26, 1973, the Court of Appeals reversed the order of the Appellate Division and reinstated Miller's conviction for felony murder. In its opinion, the Court of Appeals wrote in relevant part:

The issue presented upon this appeal is whether a burglary based upon the crime of assault can properly serve as a predicate for a felony murder conviction.

* * *

Both the trial court and the majority at the Appellate Division took the position, and the defendant so argues that the crime of assault, not burglary, was the underlying felony upon which the felony-murder conviction stood, and that since assault is not one of the

predicate felonies enumerated in the felony-murder statute, the conviction of felony murder should not be permitted to stand.

* * *

The People's evidence, if believed, established that the defendant went to Fennell's apartment uninvited and armed with a butcher knife and a spray can [of mace]; that when the apartment door was opened, he lunged across the threshold, sprayed Fennell with a choking gas, and attacked him with the knife; and that when Aleem came to Fennell's aid, the defendant fatally stabbed him. We deem this evidence to be legally sufficient for the jury to find that the defendant committed the crime of burglary by knowingly entering unlawfully Fennell's apartment with the intent to assault Fennell. Clearly, had there been no homicide, but merely an unlawful entry by defendant into Fennell's apartment with the intent to assault Fennell, the crime of burglary would have been committed. Thus, since the defendant killed Aleem in the course of and in furtherance of his commission of burglary, the requirements of the felony-murder statute are satisfied.

* * *

Defendant would have us extend the merger doctrine to the facts of this case with the result that neither the assault on Fennell, nor the assault on Aleem, could, for the purpose of the felony-murder statute, be used as the intended crime element of burglary. * * *

* * *

It should be apparent that the Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same

criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street. Where, as here, the criminal act underlying the burglary is an assault with a dangerous weapon, the likelihood that the assault will culminate in a homicide is significantly increased by the situs of the assault. When the assault takes place within the domicile, the victim may be more likely to resist the assault; the victim is also less likely to be able to avoid the consequences of the assault, since his paths of retreat and escape may be barred or severely restricted by furniture, walls and other obstructions incidental to buildings. Further, it is also more likely that when the assault occurs in the victim's domicile, there will be present family or close friends who will come to the victim's aid and be killed. Since the purpose of the felony-murder statute is to reduce the disproportionate number of accidental homicides which occur during the commission of the enumerated predicate felonies by punishing the party responsible for the homicide not merely for manslaughter, but for murder * * * the Legislature, in enacting the burglary and felony-murder statutes, did not exclude from the definition of burglary, a burglary based upon the intent to assault, but intended the definition to be "satisfied if the intruder's intent, existing at the time of the unlawful entry or remaining, is to commit *any* crime" (Emphasis in original).

People v. Miller, 32 N.Y.2d 157 (1973).

POINT

Ronald Miller's conviction for felony murder was supported by the evidence [answering appellant's brief].

The only issue on this appeal is whether there was any evidence to convict Ronald Miller of the crime of felony murder. Miller attempts to cloud this issue. First he claims that the United States Supreme Court has applied two standards in reviewing state convictions: whether there was any proof of the "crime" charged (*Thompson v. Louisville*, 362 U.S. 199 (1960); *Johnson v. Florida*, 391 U.S. 596 (1968)), and whether there was any proof of the "elements" of the crime charged. (*Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974).) Then he claims that somehow the two standards are different and that the second one is the one applicable in this case. He thus argues that Judge POLLACK, relying on this Court's decision in *United States ex rel. Terry v. Henderson*, 462 F.2d 1125 (2d Cir. 1972), erroneously applied the first standard. However, since a "crime" cannot exist independent of its "element", it is clear that the two standards are precisely the same. Indeed, when the Supreme Court in *Vachon* said that a conviction lacking evidence of a crucial element of the offense charged violates due process, it relied on its holdings in *Thompson* and *Johnson*. Therefore, it is clear that Judge POLLACK applied the correct standard when he found that there was evidence in the state trial of the crime charged.

This factual finding was supported by the record.* As the New York State Court of Appeals has held, there was ample evidence in this case which proved each element of the crime of felony murder. *People v. Miller*, 32 N.Y.2d 157, 159 (1973). Under New York State Penal Law §125.25, a person is guilty of murder when:

* * *

3. Acting * * * alone * * * he commits or attempts to commit * * * burglary * * * and in the course of and in furtherance of such crime * * * he, * * * causes the death of a person other than one of the participants;
* * *

There is no question that Miller caused the death of Rasul Aleem. The only issue is whether he did so in the course of a burglary.

Under New York State Penal Law Section 140.20, to establish the crime of burglary, it must be shown that defendant "knowingly enters or remains unlawfully in a building with intent to commit a crime therein."

As appellant concedes, the evidence established that he entered Fennell's apartment with the intent to assault him. *See*, appellant's brief, p. 15. Therefore, the only remaining issue is whether there was any evidence at all to show

* By a strained reading of Judge POLLACK's opinion, appellant also argues that the district court did not review the facts of this case but instead held that his claim did not raise a constitutional issue. However, Judge POLLACK, of necessity, reviewed the facts presented in the state court in order to find, as he did, that Miller's honest belief that he had been invited to Fennell's apartment was a fact question for the jury. Judge POLLACK specifically said that this was not a case in which the People failed to present any evidence of the crime. And, since as we have said, a "crime" cannot exist independent of its elements, it is clear that Judge POLLACK found that there was some evidence on each of the elements of the crime.

that Miller knowingly entered or remained unlawfully in Fennell's apartment.

Under New York law, when a person enters a dwelling without an invitation, his entry is unlawful. *People v. Miller*, 32 N.Y.2d 157, 159 (1973). Fennell testified that he did not call out to Miller that morning or invite him into the apartment (Fennell: 241). When Fennell opened the door in response to Miller's knocking, he did not invite Miller to enter the apartment (Fennell: 304-305). Miller lunged across the threshold. Clearly the evidence established that appellant's entry was unlawful. *People v. Miller, supra*.

So too, when Miller stood in Fennell's doorway and began to stab Fennell with a knife and spray mace into his face and then followed the retreating Fennell into his apartment, continuing to stab and spray him, the jury could have reasonably believed that Miller knew that his entry and remaining in Fennell's apartment were without license.

There was some evidence to the contrary. Mattie Zigler testified that she heard an unidentified male voice from downstairs say that if Miller "wanted to do anything about it to come downstairs." (Zigler: 167-168). Miller testified that Ms. Zigler told him that "the man downstairs underneath [them] had called" (Miller: 535). Though neither testified that Fennell invited Miller to come to his apartment, the jury might have credited Miller's testimony that he believed that he was invited. But the jury was not required to believe Miller's story, and it did not do so. In-

stead the jury chose to believe Fennell's testimony that Miller, uninvited, lunged into Fennell's apartment when Fennell opened the door. Since there was evidence to support its conclusion, Miller's conviction did not violate due process. *United States ex rel. Terry v. Henderson, supra.*

Conclusion

The order appealed from should be affirmed.

Respectfully submitted,

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September, 1975

Service of 8 copies of the
within brief is hereby
admitted this 15th day of

September 1975

Signed The Legal Aid Society

Attorney for Petitioner-Appellant

By [Signature]